

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996 C. 113

by

T. JARROLD & ASSOCIATES LTD.
("Jarrold")

and

TOM R. JARROLD
("T. Jarrold")

- of Determinations issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO.: 98/575 and 98/576

DATE OF DECISION: January 13, 1999

DECISION

APPEARANCES

These appeals proceeded by written submissions.

OVERVIEW

These are appeals by Jarrold, pursuant to Section 112 of the Employment Standards Act (the "Act"), against Determinations of the Director of Employment Standards (the "Director") issued on April 28, 1998. In these appeals Jarrold claims that no wages are owed to Nick Van Ravenstein ("Van Ravenstein") and that Jarrold did not contravene s. 46 of the Act.

The Director issued several Determinations against Jarrold and T. Jarrold. The Determinations under appeal are as follows:

April 28, 1998	T. Jarrold & Associates Ltd. in the amount of \$4,176.23
April 28, 1998	T. Jarrold & Associates Ltd. in the amount of \$500.00
April 29, 1998	Director's Determination in the amount of \$3,521.58

There were other Determinations but Jarrold has only appealed these three above-noted Determinations (the "Original Determinations").

ISSUE TO BE DECIDED

Whether the appeal was in time pursuant to s. 114 of the Act.

FACTS

Since this decision will address the timeliness of the appeal, it is not necessary to deal with the merits of the appeal to any great degree.

The Original Determinations indicated that the appeal date for the Original Determinations would be May 21, 1998. The evidence discloses that the Original Determinations were received by Jarrold and T. Jarrold on April 30, 1998.

On May 1, 1998 T. Jarrold caused a letter to be sent to an intermediary, Pastor Albert Westerhuis enclosing a bank draft made payable to Van Ravenstein in the amount of \$1,512.62.

The following excerpts are from the letter to Pastor Westerhuis:

I would appreciate you or one of the elders getting this bank draft to Nick. Last August when he had to suddenly quit without notice I owed him some money for work he had done. He must really need this and apparently does not feel he can come to me directly. Instead I found myself being persuaded by the Labour Standards people.

This is actually the first opportunity I have had to deal with this. Tax season was good to us, allowing us to pay off the bank overdraft and now deal with Nick. ...

On June 11, 1998 a letter was sent to the Employment Standards Branch, Surrey office, signed by T. Jarrold. It provides in part as follows:

A period of six weeks has now nearly elapsed since funds believed owing to Nick Van Ravenstein were paid. He was given an opportunity through our Minister and an elder to review the records of the company he worked for. He has not done so, therefore we assume he was satisfied with the outcome.

The amount paid was precisely what was communicated to your officer, Ms. D. Lynne Fanthorpe. The amount was paid in keeping with the time frame originally promised, that being the latter part of April, 1998. In my view the matter is closed except for some paper work at your end.

That (sic) is some Determinations issued by D. Lynne Fanthorpe under signature of a Theresa Robertson. These are issued against a company that has not had employees since 1993. These demonstrate an inability to use your services as an intermediary. I choose not to criticize your actions and accept none from you. Simply cancel these Determinations.

It seems that the June 11, 1998 letter was not forwarded to the Branch until July 2, 1998. On July 3, 1998 the Branch received a letter again signed by T. Jarrold saying as follows:

I originally attempted to write you back on June 11, 1998. Unfortunately I could not find the proof of payment I said was enclosed. That has now been found and is attached along with a copy of my correspondence to the Minister of our church.

You may be interested in knowing that I still have not heard back from Nick on my offer to review the records with an elder of his choosing that was offered on May 1, 1998.

I would appreciate hearing from you that the invalid Determinations have been cancelled.

On June 24 and July 16, 1998 the Director's delegate issued demand notices pursuant to s. 89 of the Act in order to collect the amount set out in the Original Determinations.

On July 16, 1998 the Director's delegate issued further Determinations in the name of T. Jarrold Management Systems Ltd. as a result of information provided by T. Jarrold to the

effect that this latter company was the true employer of Van Ravenstein. This Determination has not been appealed by Jarrold and will not be further referred to.

The demand notices were successful in attaching some funds.

On August 28, 1998 T. Jarrold, on T. Jarrold Management Systems Ltd. letterhead, wrote to the Tribunal. The Tribunal received the letter on September 3, 1998. This letter requested an extension of time to file an appeal of the Original Determinations. T. Jarrold set out the following in his letter:

The facts as laid out in the appeal are reasonably well stated. The Determination was issued on a company that had no employees although the officer was advised of this. Subsequently the officer issued garnishees on a business she had no Determination against. Although advised of this she then proceed to follow this up with a further garnishee on another company.

Missing the appeal date was an oversight. I was endeavouring to deal with the employee directly through our Minister as I was uncomfortable with the manner of Ms. Fanthorpe. Unfortunately, simultaneous to this a foster child in my care disappeared. I was experiencing random break-ins to my home and revenue property. Frankly I have little recall of the period May 19, 1998 to July 2, 1998 as my world turned sideways and upside down. I spent most of my time trying to locate the boy, change locks, repair damage and maintain headway on serving my clients before the corporate tax filling (sic) deadline of June 30, 1998.

By letter of September 28, 1998 T. Jarrold in submissions to the Tribunal said as follows:

It is through the information submitted that I learned of new findings being issued. No one advised me of there (sic) revision until receipt of this package from you although my mailing address is clearly visible.

ANALYSIS

The only question in this appeal is whether Jarrold is entitled to an extension of time to file the appeal herein. It is not within my jurisdiction to make a decision on the merits of the dispute except to the limited extent discussed below.

S. 109(1)(b) of the Act gives discretion to the Tribunal to:

extend the time period for requesting an appeal even though the period has expired.

Many decisions of the Tribunal have considered the test to be employed in these cases. The statement of the test in Niemsito BC EST #D099/96 is often quoted. Pursuant to this case the appellant must satisfy the Tribunal that:

There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

There has been a genuine, ongoing, bona fide intention to appeal the Determination;

The respondent as well as the Director has been made aware of this intention;

The respondent will not be unduly prejudiced by the granting of an extension; and

There is a strong prima facie case in favour of the appellant.

The only reason raised by Jarrold and T. Jarrold as supporting the extension of time is an oversight due to turmoil in T. Jarrold's personal life. He mentions a foster child in his care disappearing but does not say for how long. He mentions that there were random break-ins to his home and revenue property but again does not say during what time frame these occurred. He indicates that he has "little recall" of the period May 19 to July 2, 1998. He indicates that he spent most of his time trying to locate his missing foster child, changing locks, repairing damage and maintaining headway in serving his clients before the corporate tax filing deadline of June 30, 1998. This is in contrast to the letter previously referred to Pastor Westerhuis dated May 1, 1998 (at about the time that he received the Original Determinations in question) saying that this was his first opportunity to deal with Van Ravenstein's claim and indicating that tax season was good to him. The tone of his letter indicated that his personal life seemed to have settled down.

No explanation is offered for the delay between April 30, 1998, being the date of the receipt of the Original Determinations and May 19, 1998, being apparently the date that T. Jarrold's life was thrown into turmoil. His submissions are also inconsistent in that despite the turmoil in his life he was able to write to the Branch dated June 11, 1998 indicating his view that the amount that he had paid to Van Ravenstein was the extent of his obligation and disputing any further obligation. By July 2, 1998 clearly T. Jarrold was in a position to deal with the issue of the Original Determinations. Despite this no appeal was filed until early September of 1998.

It must be remembered that the legislated appeal period is shorter than was allowed to the appellant's by the Director's delegate. S. 112 of the Act for example indicates that request for appeal must be delivered within 15 days after the date of service of the person who is served by registered mail. Arguably the appeal period would have expired on May 15 or 16, 1998. In other words, under s. 112 and 122 of the Act the time for appeal may well have been shorter had not the Director stipulated that the appeal could be made prior to May 21, 1998.

I therefore find that Jarrold and T. Jarrold have not provided a reasonable or credible explanation for the failure to request an appeal within the statutory time limit.

It would seem that T. Jarrold has from the very beginning disagreed with the Original Determinations. It cannot be said from the correspondence and submissions that there was a genuine, ongoing, bona fide intention to appeal the Original Determinations or that Van Ravenstein as well as the Director as been made aware of this intention. In other words, while there might have been a disagreement with the Original Determinations, an intention to appeal the Determination was not really expressed in any fashion until the June 11, 1998 letter was forwarded on July 2, 1998 asking for the Determinations to be cancelled.

Jarrold has not established that Van Ravenstein will not be unduly prejudiced by the granting of an extension. Due to the failure to satisfy the first four elements of the test, it is not necessary to consider the fifth element, being the existence of a strong prima facie case. For the foregoing reasons I deny the application for extension of time.

ORDER

In summary, I order under Section 115 of the Act, that the Determinations dated April 28, 1998 be confirmed together with whatever further interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

ACK/cef